IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1278

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

v.

FRED DOYLE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENT

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COUNTER-STATEMENT OF THE CASE

Facts

Fred Doyle began teaching in the Mt. Healthy City School District in 1966. He was then 24 years old, had a bachelor of science degree, and had been certified by the State of Ohio as a high school teacher. App. 17.

Over the next five years, Doyle taught business courses in the high school, and led a number of extra-curricular school

activities. His employment had been pursuant to one-year contracts during his first three teaching years, and a two-year contract covering the 1969-71 school year. App. 18. While teaching, Doyle also earned an M.A. degree in 1968. *Id.*

Under Ohio law, had Doyle's employment been renewed for the 1971-72 school year he would automatically have achieved "continuing contract status"—Ohio's equivalent of tenure—and would have been assured of continued employment in future years absent cause for his removal. App. 18; O.R.C. §§3319.11, 3319.08, 3319.16. In the spring of 1971, however, Doyle was notified by the Board of Education (hereinafter "Board" or "School Board") that his employment would not be renewed for 1971-72. App. 18.

Throughout his five years in the school system, Doyle's teaching performance had been excellent, a fact known to the Board when it voted not to renew his employment. App. 202, 208, 219, 244-245. The principal had advised the Board "that Fred was a fine teacher"; that "he did a fine job in the classroom on the subject matter. He was very knowledgeable. He individualized instruction to the kids, to the young people . . ." App. 41. His "rapport in the classroom was fine." App. 42. In Doyle's final year of teaching, as the Board knew, the principal had enumerated, as Doyle's "excellent characteristics," "consistent and accurate in fulfilling teaching duties and extra duties," "relates well with students," and "individualizes instruction." App. 94. Doyle had received merit awards and other commendations in prior years for his excellence as a teacher, App. 18, 117-118, and his evaluations had all been in the satisfactory-to-superior range, App. 92-93, 174-175.

In addition, Doyle had been singularly successful in leading school extra-curricular activities. He founded a business club, a branch of Future Business Leaders of America, which involved students in business-related ventures including public service and fund-raising activities; Doyle devoted 300 hours per year, without pay, to sponsorship of this club. App. 19, 113-115, 202-203. He also became faculty manager of the school newspaper, "and turned its operation from red to black." App. 19, 115-116.

When Doyle received notification that the Board had decided not to extend him a continuing contract, he requested a statement of the reasons for the Board's action. In response to this request, the superintendent of schools drafted a letter of explanation; but before sending the letter to Doyle the superintendent consulted with the Board as to the reasons to be set forth in the letter. App. 247-248. The letter, in the form given to Doyle, was as follows (App. 289):

"Dear Mr. Doyle:

Continuing contracts normally are awarded to those staff members who have not only displayed professional teaching ability, but who also have shown through their words and actions that they truly support the philosophy and goals of the Mt. Healthy School System. The following reasons were submitted to the Board prior to the consideration for the continuing contract:

I. You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.

A. You assumed the responsibility to notify W. S. A. I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities.

B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present.

Sincerely yours,

Rex Ralph
Superintendent"

The first of the two reasons given for not continuing Doyle's employment—the "WSAI incident"—arose out of Doyle's role as a collective bargaining representative of the teachers. Doyle had been elected president of the Teacher's Association for the 1969-70 school year, and served as a member of its executive committee for the 1970-71 year. Due largely to Doyle's efforts, the Association was transformed from a discussion group into an effective collective bargaining representative. To achieve this transformation, Doyle lobbied for and secured the removal of all principals and administrators from membership in the Association; conducted wage surveys establishing that the school district paid less than neighboring districts; and was the chief spokesman for the teachers in the first round of collective bargaining negotiations. App. 19-21, 119-139, 143-149, 165.

One of the issues which had not been resolved in those negotiations, but which was a continuing source of controversy between teachers and administrators, was whether a "dress code" should be imposed by the administration upon the teachers. The administration had received some "feedback" from members of the public who were unhappy about the informality of teachers' dress. As a "public relations" matter, the administration wanted to accommodate these concerns, for bond issues affecting the schools' operation had to be approved by public vote. The teachers, on the other hand, had been insistent that the question of adoption of a dress code was one in which they had a substantial

interest, and thus one which should not be imposed upon them unilaterally. The administration had agreed that there would not be unilateral imposition of a dress code. App. 87, 170-171, 175-176, 199-200.

On February 8, 1971, the high school principal issued a "teacher memo," prepared at the School Board's suggestion (App. 289), announcing "decisions" which had been "made on a school-wide basis in hopes that it will help the image of the professional staff and Mt. Healthy City School District in general." App. 296. The memo directed teachers to dress conservatively. Women were instructed, *inter alia*, that pantsuits will be "considered inappropriate," and men were instructed to wear neckties and dress shirts. App. 295-296.

This memo was placed in each teacher's mailbox. When Doyle received it, he was upset that an issue which he had understood would be the subject of joint teacher-administration resolution had been unilaterally resolved by the administration. App. 171. Doyle had become friendly with a disc jockey at WSAI, a Cincinnati radio station, in the course of Doyle's sponsorship of a business club effort to raise money for the WSAI Heart Fund. App. 171. Doyle called his friend and read to him the principal's dress code memo. *Id.* The station broadcast a news item announcing adoption of the dress code. The content of the broadcast does not appear in the record. The only witness who described the broadcast, the principal, had not heard it himself, but offered this hearsay description (App. 53):

> "My understanding was that there had been statements made over WSAI about the fact that the administration of the Mt. Healthy City Schools felt that the teachers needed to dress good. I did not hear the broadcast."

The principal derived an impression, from comments he heard about the broadcast, that it had criticized "the

fact that we as administrators felt a need to talk to teachers about dress and dress code." App. 55. Although it is undisputed that Doyle's call to WSAI did not make the "controversy or problem in the system with respect to dress code . . . any worse," App. 90, Doyle's publication of the dress code troubled the administration. The principal was "concerned" by "this being put out to the media." App. 66. He testified, "I was much concerned by public reaction and any backlash . . . that could come from something being misinterpreted or being given to the public over news media in a certain way with a certain tone to it." App. 66.

The principal met with Doyle soon after learning of the broadcast. Knowing that Doyle had a friend at WSAI, he asked whether Doyle knew how the station had learned of the dress code. Doyle told him that he (Doyle) had reported it to his friend. The principal told Doyle that, while he had a right to call the station, he should first have talked to the principal about his concern. Doyle agreed that it would have been better had he talked to the principal first. App. 88-89.

When the Board of Education met the following month to decide whether Doyle should receive a continuing contract, Doyle's role in the WSAI incident was an "area of concern." App. 52-53. Some Board members "had heard the broadcast and were concerned about it." App. 187. The principal told the Board that Doyle's role in this matter was "a problem." App. 66. As the superintendent of schools testified, the WSAI incident "was in fact one of the reasons for non-renewal." App. 248. Board members were of the view that Doyle's calling the station was "not what a professional teacher does," App. 199. The letter to Doyle explaining his non-renewal stated that his disclosure of the dress code had "raised much concern not only within this community, but also in neighboring communities." App. 289.

The other reason given in the letter for not awarding

Doyle a continuing contract was the "gesture incident." App. 289. Doyle was responsible during the lunch period for maintaining discipline among students in the school cafeteria. One afternoon in November, 1970, four female students were misbehaving. When Doyle sought to quiet them down, they became insolent. In response to a comment by one of them, Doyle made a gesture employing his index and pinky fingers. App. 48, 167-168, 257-258. Viewers of University of Texas football games will recognize this gesture as the school's rally cry, "Hook-em [Long] Horns." In Ohio, the gesture has a somewhat different connotation also related to bulls. App. 24. One of the girls responded with a one-finger gesture which we believe has a uniform meaning throughout the nation. *Id.*

Aware that his gesture had been an over-reaction, Doyle reported the incident to the assistant principal and suggested that the latter convene a meeting at which Doyle could apologize to the girls. At this meeting, Doyle explained the necessity for maintaining order in the cafeteria, but apologized for the gesture. The apology was immediately accepted by three of the girls. The fourth continued to act disrespectfully, and was reprimanded by the assistant principal. At the time, the assistant principal thought the meeting had gone well, and that the incident would have no repercussions. No issue was made of the incident, Doyle was not reprimanded, and no formal record was entered in his file. App. 168-170, 257-260. However, when several months later the question of Doyle's renewal was before the Board, the principal told the Board of the incident, and at the Board's request the assistant principal prepared a memo describing the incident. App. 264, 297. Notwithstanding the incident, the principal advised the Board that Doyle "relates well to students." App 108.

Proceedings Below

Following receipt of the letter explaining the reasons for

his non-renewal, Doyle instituted the present lawsuit. Named as defendants were the Board of Education, its members in their individual and official capacities, and the school superintendent in his individual and official capacities. Jurisdiction was alleged under both 28 U.S.C. §1331 and 28 U.S.C. §1343.[1] The complaint alleged that the failure to renew Doyle's teaching contract was motivated by his exercise of rights protected by the First and Fourteenth Amendment. The complaint sought an order reinstating Doyle to his teaching position, together with "damages" in the sum of $50,000, attorney's fees, and such other and additional relief as the court might deem appropriate. App. 6-9.

Defendants' answer denied that the non-renewal was motivated by Doyle's protected activities. App. 10-12. Thereafter, defendants submitted a "pre-trial statement" reciting that *"there are no contested issues of law in the instant case.* The Plaintiffs must sustain their burden of proof by showing that the real reason that they were not re-employed was in retaliation and as punishment for exercise of their constitutionally protected rights." App. 14 (emphasis added).[2]

A trial to the court ensued at which the above facts were adduced. In addition, the principal testified that he had reported a few other incidents involving Doyle to the Board in connection with its consideration of Doyle's renewal. App. 56-60. These incidents are described in the district court's opinion at App. 21-23. Four of the five Board members testified. All claimed that the decision to

[1] The complaint contained a typographical error, referring to 28 U.S.C. §1331 as "28 U.S.C. §1931." App. 6. As the district court understood, however, "it claimed, and the claim here is well founded, that this court has jurisdiction under 28 U.S.C. §1331." App. 17.

[2] Defendants' statement referred to "plaintiffs", in the plural, because the separate complaints of three teachers had been consolidated for trial. On the eve of trial, the other two teachers withdrew their complaints, and the trial thus involved only Doyle.

deny Doyle renewal was premised on lack of tact and immaturity; none specifically identified these other incidents, or any combination of them, as having contributed to that assessment. App. 18; 182-206; 206-218, 267; 219-227; 268; 233-235, 237-239.[3] Two Board members testified that the superintendent's recommendation that Doyle be denied renewal had not been based *solely* upon the WSAI call. App. 230, 237. No Board member claimed that the WSAI call had not been a factor in the decision, nor did any assert that the decision would have been the same even without the WSAI call.

Doyle testified about his experiences following non-renewal. He had sought teaching positions in other school districts within commuting distance of Cincinnati, which had been his lifetime home, but could not obtain any. The best he could do was a position as a guidance counselor, rather than a classroom teacher, in Washington Court House, Ohio; the distance necessitated his moving from Cincinnati. During the three years between his non-renewal and the trial, he had earned $5,150 less in his new job than he would have earned had he been granted a continuing contract by defendants. App. 26, 112-113, 172-173. (His job in Mt. Healthy, had his employment been renewed, would have paid him more than $10,000 each year. App. 288.)

Following the trial, the court issued findings and conclusions. On the merits, the critical portion of the court's opinion appeared in its first two conclusions. App. 28:

> 1) If a non-permissible reason, e.g., exercise of First Amendment rights, played a substantial part in the decision not to renew—even in the face of other permis-

[3] All told, the process of receiving the reports of the administrators, hearing the superintendent's recommendation, and debating and deciding whether to renew Doyle's employment, had taken the Board less than half an hour. App. 203.

sible grounds—the decision may not stand. See *Shehan* v. *Board,* —— F.2d —— (3rd Cir. 1974) and cases therein cited; *Lusk* v. *Estes,* 361 F.Supp, 653 (Texas, 1973).

2) A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons—the one, the conversation with the radio station clearly protected by the First Amendment. A court may not engage in any limitation of First Amendment rights based on "tact" . . .

The court awarded Doyle reinstatement with backpay, the reinstatement to be with "tenure on the same basis as if he had been employed by the defendant Board during the interim." App. 28-29. Backpay was set at $5,158, which represents the difference between what Doyle actually earned in the three years between non-renewal and the reinstatement order and what he would have earned had his employment been renewed initially. App. 26-27, 31. Attorneys fees were awarded against the Board in the amount of $6,343.16 pursuant to the "private attorney general" theory which was then deemed available by the Sixth Circuit even absent express statutory mandate. *Hill* v. *Franklin County Board of Education,* 390 F.2d 583 (6th Cir. 1968). App. 29.

The court entered its award against the Board as an entity, concluding that it had authority to do so under its Section 1331 jurisdiction. The court thus found it unnecessary to resolve the "Monroe-Kenosha problem"—whether the Board was a "person" within the meaning of 42 U.S.C. § 1983—upon which plaintiff's alternative claim of jurisdiction under 28 U.S.C. § 1343 turned.[4] The court also found it unnecessary to address any possible Eleventh Amendment defense "since the parties seem to concede

[4] See n.6, *infra.*

that O.R.C. § 3313.17 (the board of each district shall be a body politic and corporate, and, as such, capable of suing and being sued, etc.) provides the necessary waiver." App. 30.[5] The court dismissed the action against all other defendants. App. 29-30.

The Board appealed. In its opening brief to the Court of Appeals the Board for the first time asserted an Eleventh Amendment defense. In its reply brief to the Court of Appeals the Board for the first time challenged the existence of the requisite "amount in controversy" for § 1331 jurisdiction.

The Sixth Circuit (Judges Weick, Peck and Miller) affirmed in all respects but one: it set aside the award of attorneys fees as inconsistent with "the intervening decision in *Alyeska* v. *Wilderness Society.*" App. 35. With respect to the merits, the court concluded "that substantial evidence in the record supports the finding of the district court to the effect that appellant's action in refusing to renew appellee's contract was motivated at least in part by his action in informing a local radio station of an 'appropriate dress code' suggested for teachers, and that the district court did not err in concluding that the refusal to renew the contract was based upon a constitutionally impermissible reason." App. 34-35. The court's opinion did not mention the Eleventh Amendment or jurisdictional amount issues, but its disposition necessarily constituted a rejection of the Board's claims with respect to those issues.

SUMMARY OF ARGUMENT

I

The requisite amount in controversy existed to confer jurisdiction under 28 U.S.C. §1331. The test is whether

[5] No party had adverted to the Eleventh Amendment at any time in the district court. The court apparently drew the "concession" from the parties' silence.

the value to plaintiff of the legal and equitable relief he seeks, measured as of the date his complaint is filed, exceeds $10,000. Where plaintiff alleges that his claim is worth more than $10,000 the jurisdictional amount requirement is satisfied, unless the court finds that the allegation is in bad faith, or it appears "to a legal certainty that the claim is really for less than the jurisdictional amount." *Horton* v. *Liberty Mutual Ins. Co.*, 376 U.S. 348, 353 (1961).

The matter in controversy in the instant case included, *inter alia*, plaintiff's quest (successful below) for a court order awarding him tenure on a job paying more than $10,000 *each year*. Throughout this nation's history, the rule has been that the value of a suit in which the plaintiff seeks to hold or obtain a job is measured by the salary of the job over the term for which he will be entitled to hold it. It is immaterial that circumstances can be imagined in which the remedy will be shown, with hindsight, not to have been worth the jurisdictional amount: e.g., if plaintiff quits, dies or is fired before earning the jurisdictional amount, or if plaintiff mitigates his losses below that amount by securing other employment. "Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289-290 (1938). It cannot seriously be contended that the "present value" of tenure to plaintiff, at the time he filed this lawsuit, did not exceed $10,000.

II

The courts below correctly ruled that the Board had denied Doyle a continuing contract for a constitutionally impermissible reason, and properly awarded him reinstatement with a continuing contract.

A. The Board was not permitted to rely upon Doyle's

exercise of First Amendment rights in deciding whether to award him a continuing contract. *Perry* v. *Sindermann*, 408 U.S. 593, 597-598 (1972). It is undisputed that the Board relied upon Doyle's phone call to WSAI in deciding not to extend him a continuing contract. That call, which brought to public attention an action taken by the Board on a matter which was then of considerable public interest in the community, was protected by the First Amendment. There was here no "detriment to the interests of the schools" which outweighed Doyle's First Amendment interests. *Pickering* v. *Board of Education*, 391 U.S. 563, 571 (1968). Neither the Board's concern for its "public relations image", nor interests in confidentiality, good working relationships, and having complaints processed through internal channels, tip the scales in this case against protection of Doyle's right to make the call.

That the Board characterized the phone call as exhibiting a "lack of tact" cannot change the constitutional analysis. This is not a case in which a teacher exercised his right to speak in so patently offensive or tactless a manner as to cast doubt upon his capacities as a teacher. Here, Doyle did no more than read the dress code memo to the radio station. His "lack of tact" was not the manner of his speaking, but that he chose to speak at all. In this context, "lack of tact" is but a label for punishing speech itself.

B. A decision predicated in part upon an employee's protected speech violates the First Amendment, as the courts of appeals uniformly have held. Whether a teacher's employment is terminated wholly or partially in retaliation for the exercise of First Amendment rights, a penalty is exacted for that exercise, and future exercise of those rights by that teacher or others may be chilled.

Petitioner's argument that under this rule "a teacher might participate in unpopular conduct just to insure em-

ployment" misapprehends the meaning of the rule. The rule provides no protection to a teacher who is terminated for permissible reasons, regardless of whether the teacher has engaged in protected activity. Nor is the rule invoked by the mere fact that governmental decision makers are aware of, and view with distaste, a public employee's involvement in protected activities, so long as that involvement does not play a part in their decision. The rule has effect only where the employee can show that the government *relied upon* the impermissible reason in reaching its decision.

The rule does not depend upon the substantiality of the reliance. But even if it did, the district court's express finding that the phone call played "a substantial part" in the Board's decision is amply supported by the record.

C. The remedy awarded by the district court and upheld by the court of appeals properly restores to Doyle what he was unconstitutionally denied: a continuing contract to teach.

Courts have an obligation to fashion a remedy which "make[s] good the wrong done." *Bell* v. *Hood,* 327 U.S. 678, 684 (1946). A wrong of the type here is not made good if the victim remains in a less advantageous position because of his exercise of First Amendment rights. Where First Amendment rights are concerned a make-whole remedy is particularly important to avoid a "chilling effect" on the willingness of the victim and others to engage in protected conduct. Consistent with these principles, the federal courts of appeals uniformly have held that reinstatement is a necessary part of the remedy where a teacher, or other public employee, has been terminated for the exercise of rights protected by the First Amendment.

This case provides no occasion for an exception to this uniform result. When a public employee shows that he was terminated from his job in part because of his exercise of

rights protected by the First Amendment, he is presumptively entitled to the remedy of reinstatement. That the public employer's decision was based in part on permissible as well as impermissible factors is pertinent only if it could be established that the employer would have made the same decision even without the impermissible factor. It is the employer's burden to prove that his decision would have been the same: "No reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue." *Franks* v. *Bowman Transportation Co.,* —— U.S. ——, 44 LW 4356, 4363, n.32 (1976). As with analogous cases dealing with the question who is entitled to a "make-whole" remedy where racial discrimination in employment has been proved, the employer's burden can be met only by "clear and convincing" evidence.

Petitioner has failed to meet this burden. At trial, none of petitioner's witnesses denied that the phone call to the radio station played a part in the Board's decision; none of petitioner's witnesses testified that the Board would have reached the same result if it had not considered that call. Petitioner presented no showing which would defeat Doyle's presumptive entitlement to reinstatement with a continuing contract. That remedy was therefore properly awarded by the courts below.

III

The backpay award against the Board is not barred by the Eleventh Amendment. That Amendment immunizes the "State" from retroactive monetary liability, and if Ohio had chosen to run the public schools through the state government it could not be held monetarily accountable for its wrongs. But Ohio, like most states, has opted for local control and management of its schools through locally elected boards of education which function as autonomous political and corporate entities. Cf. *Milliken* v. *Bradley,* 418 U.S. 717 (1974). That option has critical

significance to the application of the Eleventh Amendment, for here it is not the state government, but rather a local school board, which has committed the wrong, and plaintiff seeks recovery from that board, not from the state treasury. Ohio school boards have fiscal independence, with general taxing and bond issuing powers, and the backpay award in this case cannot impact upon the state treasury. It is hornbook law that "a suit against a county, a municipality, or other lesser governmental unit is not regarded as a suit against a state within the meaning of the Eleventh Amendment", Hart and Wechsler, *The Federal Courts and the Federal System,* 690 (2d Ed). This Court has repeatedly so held.

ARGUMENT

I. THE REQUISITE AMOUNT IN CONTROVERSY EXISTED TO CONFER JURISDICTION UNDER 28 U.S.C. § 1331.

In his complaint, plaintiff asserted jurisdiction on two grounds: a cause of action directly under the Fourteenth Amendment, with jurisdiction predicated upon 28 U.S.C. §1331; and a cause of action under the Civil Rights Act of 1871, 42 U.S.C. §1983, with jurisdiction predicated upon 28 U.S.C. §§1343(3) and (4). The district court ruled that it had jurisdiction of this action against the School Board under 28 U.S.C. §1331, and thus found it unnecessary to state "any conclusion on the possible Monroe-Kenosha problem in this case."[6]

[6] The court's reference was to *Monroe* v. *Pape,* 365 U.S. 167 (1961) and *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973), in which this Court held that municipalities are not "persons" within the meaning of § 1983. The "problem" which the district court found it unnecessary to decide is whether school boards should be equated with municipalities for § 1983 purposes. Cf. *Mayor* v. *Educational Equality League,* 415 U.S. 605, 612 n. 11 (1974). The courts of appeals have recognized themselves to be in conflict on the question. *Gray* v. *Union County Intermediate Education District,* 520 F.2d 803, 805 n. 1 (9th Cir. 1975); *Thomas* v. *Ward,* 529 F.2d 916, 920-921 n. 2 (4th Cir. 1975). The Seventh Circuit has held that the outcome turns upon the particular status of the school board under state law, *Cf. Aurora Education Association* v. *Board of Education,* 490 F.2d 431, 435 (7th Cir. 1973), cert. denied 416 U.S. 985 (1974) *with Hostrop* v. *Board of Junior College Dist. No. 515,* 523 F.2d 569, 576-577 n. 2 (7th Cir. 1975). The Second Circuit has adopted a similar approach, *cf. Forman* v. *Community Services, Inc.,* 500 F.2d 1246, 1255 (2nd Cir. 1974) *with Monell* v. *Dept. of Social Services,* 532 F.2d 259, 263 (2nd Cir. 1976). See also *Keckeisen* v. *Independent School District 612,* 509 F.2d 1062, 1065 (8th Cir. 1975), cert. denied 423 U.S. 833 (1975); Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 Harv. L. Rev. 922, 924-925, n. 15 (1976).

Petitioner acknowledges that "Doyle is entitled to jurisdiction under §1331 provided he can establish a substantial federal question and $10,000 in controversy." (Brief, page 22). Petitioner's only argument against §1331 jurisdiction is that "plaintiff never had a good faith claim that could under any circumstances amount to $10,000." *Id.* page 9; see also page 22. We show herein that this contention lacks merit, and that the courts below properly concluded that the requisite jurisdictional amount was present here.[7]

[7] This Court, of course, may inquire into its jurisdiction *sua sponte,* on grounds not advanced by the parties. The question whether a cause of action for damages "exists directly under the Fourteenth Amendment irrespective of the implementing civil rights legislation," *Aldinger* v. *Howard,* 44 L.W. 4988, 4989, n. 3 (1976), is one of great current interest and importance, has been addressed recently in innumerable lower court opinions and is the subject of a comprehensive article published earlier this year. Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 Harv. L. Rev. 922 (1976). That question is not, however, a *jurisdictional* question. Plaintiff's *assertion* that a cause of action exists directly under the Fourteenth Amendment is sufficient to confer jurisdiction under 28 U.S.C. §1331, regardless of whether the assertion ultimately proves correct, so long as it is not "wholly insubstantial and frivolous." *Bell* v. *Hood,* 327 U.S. 678, 682-683 (1964). That plaintiff's assertion is substantial is apparent not only from the persuasive analysis in the Harvard Note, *supra,* but also from the fact that the vast majority of the lower courts which have addressed the question have concluded that such a cause of action exists. *Hanna* v. *Drobnick,* 514 F.2d 393, 398 (6th Cir. 1975); *Skehan* v. *Board of Trustees of Bloomsburg State College,* 501 F.2d 31, 44 (3rd Cir. 1974), vacated

In determining whether "the matter in controversy exceeds the sum or value of $10,000," 28 U.S.C. §1331(a), the critical question is the value *to the plaintiff* of the relief he seeks. *Packard* v. *Banton,* 264 U.S. 140, 142 (1924); *Weinberger* v. *Weisenfeld,* 420 U.S. 636, 642 n. 10 (1975); 1 Moore's Federal Practice (2d Ed. 1976), par. 0.91[1], p. 827, and cases cited therein. The plaintiff's assertion in his complaint that his claim is worth more than $10,000 is determinative, unless the court finds that the assertion is in bad faith, or it appears "to a legal certainty that the claim is really for less than the jurisdictional amount." *Horton* v. *Liberty Mutual Ins. Co.,* 376 U.S. 348, 353, (1961). Accord: *St. Paul Indemnity Co.* v. *Red Cab Co.,* 303 U.S. 283, 289 (1938); *Weinberger, supra.*

Where the complaint seeks equitable relief which, if granted, would forestall the plaintiff's suffering monetary injury exceeding $10,000, the jurisdictional requirement is met; it is not necessary that plaintiff wait until he has actually suffered the injury. The "want of a sufficient amount of damage having been sustained to give the federal court jurisdiction will not defeat the [jurisdiction], as the removal of the obstruction is the matter of controversy, and the value of the object must govern." *Mississippi & Missouri R.R.*

on other grounds, 421 U.S. 983 (1975); *Roane* v. *Callisburg Independent School District,* 511 F.2d 633, 635, n. 1 (5th Cir. 1975); *Hostrop* v. *Board of Junior College Dist. No. 515,* 523 F.2d 569, 577 (7th Cir. 1975); *Fitzgerald* v. *Porter Memorial Hospital,* 523 F.2d 716, 718-719, n. 7 (7th Cir. 1975) (Stevens, J.); *Cox* v. *Stanton,* 529 F.2d 47, 50-51 (4th Cir. 1975). See also *Brault* v. *Town of Milton,* 527 F.2d 730 (2nd Cir. 1975), *vacated on other grounds, id.* at 736, 738 (2nd Cir. 1975) (en banc); cases cited in Harvard Note, *supra,* 89 Harv. L. Rev. at 928-929, notes 40-46; and *Panzarella* v. *Boyle,* 406 F. Supp. 787, 791-793 (D.R.I. 1975) and cases cited therein.

Petitioner did not seek review of the decisions below insofar as they held, "on the merits" (*Bell* v. *Hood, supra,* 327 U.S. at 682), that plaintiff had a cause of action directly under the Fourteenth Amendment. Accordingly that issue is not before the Court in this case.

Co. v. *Ward,* 67 U.S. 485, 492 (1863). Accord: *Packard, supra; Weinberger, supra.*

In the present case the complaint alleged that defendants had denied plaintiff a continuing contract because of his First Amendment activity. Plaintiff claimed as relief (and obtained below) reinstatement with a continuing contract. That relief invests plaintiff with an expectancy of continued employment for the remainder of his working life absent "good and just cause,"[8] on a job paying more than $10,000 *each year* (App. 288). It cannot seriously be suggested that the "present value" of that relief to plaintiff, at the time he filed his lawsuit, did not exceed $10,000.

Throughout this nation's history, the rule has been that the value of a suit in which the plaintiff seeks to hold or obtain a job is measured by the salary of the job over the term for which he will be entitled to hold it. *The Columbian Ins. Co.* v. *Wheelwright,* 20 U.S. 534 (1822); *U.S.* v. *Addison,* 63 U.S. 174, 184 (1860); *Smith* v. *Whitney,* 116 U.S. 167, 173 (1886); *Smith* v. *Adams,* 130 U.S. 167 (1889); *Chaudoin* v. *Atkinson,* 494 F.2d 1323, 1328 (3rd Cir. 1974); *Nord* v. *Griffin,* 86 F.2d 481 (7th Cir. 1936), cert. denied 300 U.S. 673 (1937); *Friedman* v. *International Association of Machinists,* 220 F.2d 808 (D.C. Cir. 1955), cert. denied 350 U.S. 824 (1955); *White* v. *Bloomberg,* 345 F. Supp. 133, 141 (D. Md. 1972); *Patterson* v. *City of Chester,* 389 F. Supp. 1093, 1095-96 (E.D. Pa. 1975).

In any such suit, of course, the possibility exists that the remedy, if granted, would prove with hindsight not to have

[8] Under Ohio law, "a continuing contract is a contract which shall remain in effect until the teacher resigns, elects to retire, or is retired pursuant to § 3307.37 of the Revised Code [mandatory retirement at age 70], or until it is terminated or suspended. . ." O.R.C. § 3319.08. The grounds upon which such a contract can be terminated or suspended are specified in O.R.C. § 3319.16: "for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause."

benefited the plaintiff in the jurisdictionally required amount. The plaintiff might quit or die before earning the requisite amount; or he might engage in acts of misconduct triggering his termination before he had earned that amount. But these possibilities, however real, are "immaterial"; it is enough that there is no legal certainty that the value will prove less than the jurisdictional amount. *Aetna Casualty Co.* v. *Flowers,* 330 U.S. 464, 468 (1947); *Brotherhood of Locomotive Firemen* v. *Pinkston,* 293 U.S. 96, 100 (1934); *Thompson* v. *Thompson,* 226 U.S. 551, 559-560 (1913).[9] In *Thompson,* for example, anticipated monthly payments pursuant to a maintenance award over a period of years sufficed to establish the jurisdictional amount, even though the award was "subject to be modified from time to time or even cut off entirely, in the event of a change in the circumstances of the parties" before the jurisdictional amount was recovered. 226 U.S. 559.

Similarly, in any employment case the possibility exists that the plaintiff might be able to secure alternate employment which, over the term of employment at issue, might mitigate his losses below the jurisdictional amount. But that possibility can not defeat jurisdiction, for the claim is valued at the time the suit is filed, and "[e]vents occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." *St. Paul Indemnity, supra,* 303 U.S. at 289-290; 1 Moore's, *supra,* par. 0.91[3], p. 850, and cases cited in n. 1 thereat. Since, in the instant case, it could not be known to a legal certainty that plaintiff would be able to secure alternate employment throughout his career keeping his cumulative injury at $10,000 or less,[10] the jurisdictional amount was present.

[9] See also *Weinberger, supra,* where it was possible (if the plaintiff opted to work continuously, and was able to secure employment) that the relief sought would yield him no monetary benefit.

To be sure, plaintiff had already obtained an alternate contract for the 1971-72 school year at the time he brought suit, in an amount only about $2,000 less than he would have earned with Mt. Healthy (App. 172, 288, 290), and arguably that sufficed to establish that his injury *in that year* would not exceed $10,000.[11] But plaintiff's alternate employment was pursuant to a one-year contract, and he did not have the assurance of continued employment thereafter which his continuing contract with Mt. Healthy would have provided him. The possibility thus existed that in the very next year he might suffer a monetary loss exceeding $10,000. And even if he were able continuously to obtain alternate employment, it was virtually inevitable that his cumulative loss would exceed $10,000, for his salary at the new school district was less than that which he would receive in Mt. Healthy (App. 288, 290). Thus, by the end of the third year, the difference had already mounted to $5,158. Assuming the pay differential has continued at the same rate, it will have exceeded $10,000 by the time of this Court's decision, and this despite the fact that plaintiff has obtained and held alternate employment throughout the period of litigation. The district court computed backpay only to the date of judgment, expecting that plaintiff would then be reinstated and suffer no additional loss. But the Board's appeals have delayed plaintiff's reinstatement another three

[10] Indeed, as we show shortly, it is probable that plaintiff has *already* suffered an injury exceeding $10,000 and he will be entitled to recomputation of his backpay upon remand to such an amount.

[11] We say "arguably," because plaintiff had not yet received the money, nor had he performed the services for which the money was promised. Circumstances can be envisioned, e.g. a financial emergency in his new school district requiring a lay-off of some teachers, which would have resulted in his not receiving the contractually promised work and/or salary.

years, and plaintiff will be entitled to recomputation of his backpay award to an amount which probably will exceed $10,000.

The School Board argues that in determining whether plaintiff's claim met the jurisdictional amount no value can be assigned to his quest for a remedy awarding him a continuing contract. "Although he was eligible for a tenured contract at the discretion of the school board, he was not entitled to it by state law, and no value can be assigned to something he held no legal interest in" (Brief, p. 23). But this misconstrues both the nature of plaintiff's claim and the standards which the courts apply in determining existence of the jurisdictional amount. Plaintiff did not contend that he had a "property" interest entitling him to a continuing contract. But he contended that he was entitled to a judicial order requiring that he be granted a continuing contract because the reason motivating the Board's withholding of such a contract was his exercise of his First Amendment rights. The "matter in controversy", i.e. the relief claimed by plaintiff, included a continuing contract, and the value of that contract is properly included in determining the jurisdictional amount. Plaintiff's quest surely was not frivolous: it was upheld by both courts below, and as we show *infra*, they were right in upholding it. But whatever the ultimate legal outcome, it could not defeat jurisdiction. That a plaintiff ultimately loses on the merits, and thus does not *recover* the jurisdictional amount, is irrelevant, *St. Paul Indemnity, supra,* 303 U.S. at 289, so long as it was not a "legal certainty," at the time the complaint was filed, that he would lose. *Ibid.*[12]

[12] We do not mean to suggest that plaintiff's quest for a continuing contract was *indispensable* to his entitlement to claim relief beyond the first year, and thus to his right to have the value of subsequent years' employment considered in valuing his claim. In many First Amendment and procedural due process cases, courts have granted backpay and/or reinstatement beyond one year, even though the plaintiff had no "property" right to employment beyond that year. See, e.g., *Abbott* v. *Thetford,* 529 F.2d 695, 701 (5th Cir. 1976); *Sterzing* v. *Fort Bend Ind. Sch. Dist.,* 496 F.2d 92, 93 (5th Cir. 1974); *Janetta* v. *Cole,* 493 F.2d 1334 (4th Cir. 1974); *Gieringer* v. *Center School District No. 58,* 477 F.2d 1164, 1167 (8th Cir. 1973), cert. denied 414 U.S. 832 (1973); *Wellner* v. *Minnesota State Junior College Board,* 487 F.2d 153, 157 (8th Cir. 1973) (order denying petition for rehearing); *Cooley* v. *Board of Education,* 453 F.2d 282, 287 (8th Cir. 1972); *Ramsey* v. *Hopkins,* 447 F.2d 128 (5th Cir. 1971); *Johnson* v. *Branch,* 364 F.2d 177, 182 (4th Cir. 1966) (en banc), cert. denied 385 U.S. 1003 (1967); *Zimmerer* v. *Spencer,* 485 F.2d 176, 179 (5th Cir. 1973) (dictum). Cf. *Vitarelli* v. *Seaton,* 359 U.S. 535, 545, 546 (1959); *Greene* v. *United States,* 376 U.S. 149 (1964).

Because plaintiff's employment interest here involves more than $10,000, it is unnecessary to address the question, upon which the lower courts are in conflict, of what value to assign to vindication of the constitutional right *itself*. See Harvard Note, *supra,* 89 Harv. L. Rev. at 960 n. 189, and cases cited therein.

II. THE COURTS BELOW CORRECTLY RULED THAT THE BOARD HAD DENIED DOYLE A CONTINUING CONTRACT FOR A CONSTITUTIONALLY INPERMISSIBLE REASON, AND PROPERLY AWARDED HIM REINSTATEMENT WITH A CONTINUING CONTRACT.

The Board argues that it did not violate Doyle's constitutional rights, and that even if it did, reinstatement with a continuing contract was an improper remedy (Brief, pp. 10-16). As we understand the Board's argument, it makes essentially three points:

First, it was entitled to rely upon Doyle's phone call to WSAI in deciding whether to grant him renewal (and the continuing contract which, by operation of Ohio law, would automatically accompany renewal).

Second, even if reliance upon the phone call was improper, there was no First Amendment violation because the phone call constituted only "part"—and not a "substantial part"—of the reason for its decision.

Third, even if the First Amendment was violated, rein-

statement with a continuing contract was an improper remedy.

We treat these points in turn.

A. The Board Was Not Entitled to Rely Upon Doyle's Phone Call to WSAI in Deciding Whether To Grant Him Renewal.

Doyle had no "property" right to continued employment. The Board was not obliged, under Ohio law, to have "cause" in order to decide that he should not be renewed and thereby awarded a continuing contract. Nevertheless, in deciding whether to confer these benefits upon Doyle, the Board was not permitted to rely upon Doyle's exercise of his First Amendment rights. *Perry* v. *Sindermann,* 408 U.S. 593, 597-598 (1972):

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall,* 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.
>
> We have applied this general principle to denials of tax exemptions, . . . unemployment benefits, . . . and welfare payments, . . . But, most often we have applied the principle to denials of public employment. . . We have applied the principle regardless of the public

> employee's contractual or other claim to a job. Compare *Pickering* v. *Board of Education,* [391 U.S. 563], with *Shelton* v. *Tucker,* [364 U.S. 479].
>
> Thus, the respondent's lack of a contractual or tenure 'right' to re-employment for the 1969-1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. *Shelton* v. *Tucker,* supra; *Keyishian* v. *Board of Regents,* [385 U.S. 589]. We reaffirm those holdings here."

It is undisputed that the Board relied upon Doyle's phone call to WSAI in deciding not to extend him a continuing contract. The letter explaining the denial advised Doyle that "continuing contracts normally are awarded to those staff members who have not only displayed professional teaching ability, but who also have shown through their words and actions that they truly support the philosophy and goals of the Mt. Healthy school system," App. 289, and that he had fallen short of this standard in two respects, the first of which was:

> "You assumed the responsibility to notify WSAI radio station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities." (*Id.*)

Again, at trial, the school superintendent acknowledged that this was "in fact one of the reasons" for the Board's decision. App. 248.

In determining whether the Board's reliance upon this incident was constitutionally impermissible, it is important

to recall the facts precisely. Upon receiving the dress code memorandum, which he believed had been promulgated contrary to a prior promise that any dress code would be collectively negotiated, Doyle telephoned a friend at the radio station and read the memorandum to him, apparently *in haec verba*. There is no suggestion that he criticized the dress code, or its promulgators, or that he expressed any point of view concerning it. He simply brought to public attention an action taken by the School Board on a matter which was then of considerable public interest in the community. He had not been told, and the memorandum did not suggest, that its contents were to be kept confidential by the teachers who received it.

The radio station reported the adoption of the dress code. It is possible—although the record evidence is third-hand—that the broadcast was critical of "the fact that administrators felt a need to talk to teachers about dress and the dress code." App. 55. It is undisputed that Doyle's reporting of the dress code to the radio station, and the ensuing radio broadcast, had absolutely no adverse effects within the school system. App. 90.

The broadcast stirred *public* interest and discussion about the propriety of imposition of the dress code, however, App. 289, and it is precisely this which the members of the Board and their appointed administrators found disturbing. Their disenchantment with Doyle's conduct was essentially a disenchantment with the core values which the First Amendment was designed to protect. These officials simply did not like public examination of their actions, particularly by the "news media," which they considered unreliable. As the principal explained, "I was much concerned about public reaction and any backlash . . . that could come from something being misinterpreted or being given to the public over news media in a certain way with a certain tone to it." (App. 66). The superintendent and the Board were "concerned" about the broadcast (App. 52-53, 187); it

was "a problem" (App. 66); Doyle's call to the radio station was "not what a professional teacher does." (App. 199). The letter to Doyle explaining his non-renewal emphasized that his call had stimulated "much concern not only within this community, but also in neighboring communities." App. 289.

It could hardly be disputed that an ordinary citizen, possessed of the memorandum, would have had a First Amendment right to disclose its contents to a local radio station. And the premise "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work . . . has been unequivocally rejected in numerous prior decisions of this Court." *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). But:

> "At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.*

The balance was not conclusively tipped in *Pickering* by the school board's assertion that "the teacher by virtue of his public employment has a *duty of loyalty* to support his supervisors in attaining the generally accepted goals of education," *id.* at 568 (emphasis added), and neither can it be conclusively tipped here by the Board's assertion that it wishes to confine continuing contracts only to those who "have shown through their words and actions that they

truly support the philosophy and goals of the Mt. Healthy school system," App. 289. Indeed, the Board's attitude here is by far the more dangerous, for the board in *Pickering* thought that the "duty of loyalty" extended only to the point that "if [a teacher] must speak out publicly, he should do so factually and accurately, commensurate with his education and experience", 391 U.S. at 568-569, while here the Board condemned Doyle for doing precisely that.

In *Pickering,* this Court afforded First Amendment protection to false statements critical of a school board's policies. The Court found that the balance tipped in favor of First Amendment protection, because on the one hand the subject was "a matter of legitimate public concern" while on the other there was no evidence that the teacher's criticism had had effects "detrimental to the interests of the schools," 391 U.S. at 571; there was no showing, nor could it be presumed, that the criticism "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Id.* at 572-573.[14] If, absent a showing of

[14] In *Tinker* v. *Des Moines School Dist.,* 393 U.S. 503 (1969), a case involving the First Amendment rights of *students,* this Court adopted as the controlling tests whether engaging in the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," *id* at 509, or "involves substantial disorder or invasion of the rights of others," *id* at 513. In applying those tests, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," *id* at 508; there must be "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *id* at 509. Although recognizing that the interests to be weighed are in some respects different when the rights of *teachers* are involved, the lower courts have deemed these tests applicable to teacher cases as well, relying in part upon the *Tinker* decision's declaration that it cannot "be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *id* at 506. See, e.g., *James* v. *Board of Education,* 461 F.2d 566 (2nd Cir. 1972), cert. denied 409 U.S. 1042 (1972); *Russo* v. *Central Sch. Dist. No. 1,* 469 F.2d 623 (2nd Cir. 1972), cert. denied 411 U.S. 932 (1973); *Acanfora* v. *Board of Education of Montgomery County,* 491 F.2d 498, 500-501 (4th Cir. 1974), cert. denied 419 U.S. 836 (1974).

such detriment, stinging false criticism of the type involved in *Pickering* is protected, surely, in the same circumstances, sober accurate factual disclosure is protected as well. We turn, therefore, to assess the possible bases for contending that there was here a "detriment to the interests of the school" which outweighted Doyle's First Amendment interests.

The concern which actuated the Board appears to have been that public interest and controversy about its actions is *per se* detrimental. As the Board is dependent upon voter approval of bond issues, it is greatly concerned with its "public relations image." If exposure of its actions to public view leads to an unfavorable public impression of its work, the public may respond by disapproving bond issues. Surely this reasoning is a classic example of mistakenly equating "the Board members' own interests with that of the schools." *Pickering,* 391 U.S. at 571. Ohio has opted for *citizen* determination, not Board member determination, on bond issues. That the citizens are informed when they vote can hardly be a "detriment" to the schools. *Id.* at 571-572. The only thing which made *Pickering* a difficult case was that the citizens had been *falsely* informed by the teacher; that fact is not present here.

There are three other matters, unique to the employer-employee relationship, which warrant examination in this case in determining whether there was "detriment to the schools": (1) did Doyle, by disclosing the memo, violate a legitimate school interest in confidentiality? (2) did his action threaten to undermine his working relationship with the principal? (3) did his failure to first discuss the matter with school administrators violate an obligation to exhaust internal remedies? As we show, none of these considerations

tips the scales in this case against First Amendment protection.

(1) *Confidentiality.* One area in which a public employee's status differs from that of an ordinary citizen is his access to materials and information which have not been publicly disclosed. Although there is a national trend toward providing greater access to the internal workings of government,[15] there of course remain situations in which there is a valid governmental interest against disclosure.[16] In *Pickering* this Court found it "possible to conceive some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal," 391 U.S. at 570, n. 3. But this case surely does not fit that category.

The memorandum imposing the dress code did not instruct teachers to keep its contents confidential, nor could any "need for confidentiality" reasonably have been discerned by its recipients. On the contrary, the memo stressed that the reason for adopting the dress code was "to establish good public relations between the professional teacher of Mt. Healthy and the general public" (App. 294), suggesting if anything that publication of the dress code's adoption would be consistent with the interests of the school system. This case thus does not present the troublesome question whether a published rule requiring confidentiality may lawfully inhibit employee speech which

[15] That trend is reflected at the federal level in the original enactment of the Freedom of Information Act (5 U.S.C. § 552) and in its repeated liberalization, Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54; Pub. L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 1561, and at the state level by the widespread adoption of "sunshine" laws requiring administrative bodies such as school boards to reach their decisions at public meetings. See, e.g., O.R.C. § 121.22

[16] See e.g., the exceptions to the Freedom of Information Act, 5 U.S.C. § 552(b).

would otherwise be protected by the First Amendment. Cf. *Hanneman* v. *Breier,* 528 F.2d 750 (7th Cir. 1976).

Moreover, there has been absolutely no showing that disclosure here compromised the interests of the school system in any way.[17] It is conceded that disclosure had no effect within the school system. App. 90. And, as we have shown, the Board members' "public relations" desire to shield their actions from public scrutiny is not an interest warranting consideration in the balance.

(2) *Impairment of Working Relationships.* In *Pickering,* this Court recognized that the First Amendment interests *might* be outweighed in situations where "the relationship between superior and subordinate is one of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them." 391 U.S. at 570, n. 3. But this is not such a case. The record does not reflect that Doyle's relationship with the principal was of "a personal and intimate nature" (there were 88 teachers in the high school, App. 280-286), but even if it were, disclosure of the dress code memorandum cannot be "that certain form of public criticism" to which *Pickering* referred: Doyle criticized no one; he merely reported the memo's contents. And the policy which the memo con-

[17] Not only has there been no showing here; it is impossible to *conceive* of how Doyle's disclosure of the memo could have compromised legitimate school interests. The principal knew that the memo would stir a controversy among the teachers (App. 108), but they were all recipients of the memo and thus did not learn of it through Doyle's disclosure. Arguably, disclosure might have awakened student interest in the matter, but it is rather difficult to believe that the high school students would have observed the sudden change in teachers' dress without realizing what had happened or at least inquiring and learning what had happened. And if, to assume the "worst," Doyle's disclosure stirred an interest among students which might otherwise not have developed, it is difficult to perceive what governmental interest would have been jeopardized. The First Amendment, after all, was designed to protect speech which awakens interest.

veyed was "the suggestion of the Board of Education" (App. 289), not the principal's.

(3) *Exhausting Internal Channels.* The facts of *Pickering* furnished this Court "no occasion . . . for consideration of the extent to which teachers can be required by *narrowly drawn grievance procedures* to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public," 391 U.S. at 572 (emphasis added). It is not contended that there were here "narrowly drawn grievance procedures" through which dissatisfaction with the dress code could be channeled, and thus this concern is equally irrelevant here.

Doyle's principal testified that his disapproval of Doyle's call to WSAI was in part that Doyle had not talked to him first (App. 89)[18]. This is insufficient to bring this case within the "grievance procedure" exception recognized in *Pickering*, and is legally insufficient for two additional reasons.

First, while this may have been one of the reasons for the *principal's* disapproval of Doyle's actions, it was not the reason for the *Board's* decision to deny him a continuing contract. The letter explaining the Board's decision, App. 289, makes no mention of a failure to talk to the principal first but, rather, complains only that Doyle made the memo public and thus "raised much concern" in the community. That complaint would have been just as applicable if Doyle had called WSAI *after* talking to the principal.

Second, the context in which the memo was issued must be recalled. The dress code was under discussion in collective bargaining and, despite a prior assurance that it would not do so, the Board unilaterally imposed its will on the issue. It was thus the Board which removed the issue from the only internal channel—collective bargaining—established to deal with it. Surely, when management abandons joint-negotiation on a collective bargaining topic it cannot then condemn a union leader for going "outside channels" to publicize that fact. The one Board member who testified that *her* concern was Doyle's "undercutting" of the negotiations (App. 199-200) was simply blinded to the fact that it was the Board, by acting unilaterally, which had put the knife to the bargaining process. *Cf. Labor Board v. Katz*, 369 U.S. 736 (1962).

[18] It was also in part a fear of public reaction, App. 66.

In sum, there are no considerations unique to the employer-employee relationship which justified denying Doyle the right to speak enjoyed by any other citizen. In the circumstances here, as in *Pickering*, 391 U.S. at 573, "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."

Nor is it an answer, as petitioner contends (Brief, p. 11), that the Board predicated its action upon a "notable lack of tact" shown by Doyle in publicizing the memo (App. 289). The district court surely was correct in concluding that the exercise of First Amendment rights cannot be punished because perceived as tactless by the objects of the speech (App. 28). The Board members may well have been sincere in thinking it was "tactless" of Doyle to embarass them by exercising his First Amendment rights, but putting a label on their unhappiness that he chose to speak does not make their action any less an infringement of his rights. Cases can be imagined in which a teacher exercises his right to speak in so patently offensive or tactless a manner as to cast doubt upon his capacities as a teacher. But here Doyle did no more than read the dress code memo to a radio station. His "notable lack of tact" was not the manner of his speaking, but that he chose to speak at all. In this context, "lack of tact" is but a label for punishing speech itself. Cf. *Ramsey* v. *Hopkins*, 320 F. Supp. 477, 481 (N.D.

Ala. 1970), affirmed in relevant part, 447 F.2d 128 (5th Cir. 1971); *Sindermann* v. *Perry*, 430 F.2d 939, 943 (5th Cir. 1970), affirmed 408 U.S. 593 (1972); *Rampey* v. *Allen*, 501 F.2d 1090, 1099 (10th Cir. 1974), cert. denied 420 U.S. 908 (1975).

Finally, it makes no difference to the constitutional analysis that the Board here was deciding whether to confer a continuing contract rather than a one-year contract. The magnitude of the stakes justified the Board's carefully weighing the *legitimate* considerations which should inform its decision, but they did not permit reliance upon constitutionally impermissible reasons. A continuing contract, like a one-year contract, is a benefit which the Board can withhold without finding just cause, *Bishop* v. *Wood*, —— U.S. ——, 44 LW 4820, 4823 (1976), but not for "the exercise of an employee's constitutionally protected rights." *Ibid.*

Indeed, in the circumstances here, the fact that the decision involved a continuing contract *heightens* the First Amendment interest. For there are indications that the Board might have awarded Doyle another one-year contract, if that were all that had been at stake, and that their decision was prompted by a desire not to grant tenured status to a teacher who had demonstrated a capacity to speak out publicly on the Board's actions. The letter to Doyle, App. 289, explained that "*continuing contracts* normally are awarded to those staff members who . . . have shown through their words and actions that they truly support the philosophy and goals of the Mt. Healthy school system" (emphasis added), a standard to which Doyle's call to WSAI was unfaithful. That the rationale was keyed to the continuing contract decision could only intensify the "chilling effect" which accompanies any intrusion upon teachers' First Amendment rights.

This Court, in vindicating teachers' First Amendment claims, has repeatedly declared that "the viligant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960). *Accord: Keyishian, supra*, 385 U.S. at 603; *Wieman, supra*, 344 U.S. at 195. See also, *Healy* v. *James*, 408 U.S. 169. In *Shelton*, 364 U.S. at 479, the Court adopted this analysis from Justice Frankfurter's concurring opinion in *Wieman*, 344 U.S. at 195:

> "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

Nothing will "chill" the free speech of teachers more than a school board's demonstration that it will not confer tenure upon those who exercise it. Tenure is the most important benefit a teacher can hope for: it converts his status from one of dependency upon annual renewal decisions which may be attended by unreviewable "mistakes . . . inevitable in the day-to-day administration of our affairs," *Bishop* v. *Wood, supra*, 44 LW at 4823, to one of permanent protection against removal without cause, and with a right to procedural due process when such removal is contemplated. *Perry, supra*, 408 U.S. at 599-603. First Amendment values could not survive in the public schools under a rule which forbade school boards from relying upon exercises of free

speech in making annual renewal decisions but permitted them to rely upon such exercises in making tenure decisions. There are few teachers whose sights are set only on the next year, with no concern for their career.

B. The District Court's Finding That The WSAI Call Played "A Substantial Part" In The Board's Decision To Deny A Continuing Contract Is Amply Supported By The Record, And Therefore The Board's Decision Violated Doyle's First Amendment Rights.

When government acts against a citizen in part because of his exercise of constitutionally protected conduct, it by definition infringes a constitutional right of that citizen. The courts below found that Doyle had been deprived of a continuing contract to teach at a public school in part—in "substantial part" according to the district court—because of his exercise of conduct protected by the First Amendment. That finding, amply supported by the record evidence, is sufficient to establish a violation of Doyle's First Amendment rights.

We have just shown that Doyle's phone call to WSAI was protected by the First Amendment. When Doyle asked the Board to explain its decision not to renew him, the Board listed that phone call as the first of only two reasons for its action. At trial not a single witness denied that the phone call had played a part in the decision to deny Doyle a continuing contract. The district court, after hearing all the evidence, found that the WSAI call played "a substantial part" in the Board's decision (App. 28):

> "That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons—the one, the conversation with the radio station clearly protected by the First Amendment."

The court of appeals concluded (App. 34-35):

> "substantial evidence in the record supports the finding of the district court to the effect that appellant's action in refusing to renew appellee's contract was motivated at least in part by his action in informing a local radio station of an 'appropriate dress code' suggested for teachers, and that the district court did not err in concluding that the refusal to renew the contract was based upon a constitutionally impermissibly reason."

Petitioner seems to make two challenges to these factual and legal conclusions: (1) the court of appeals characterized the district court's finding as that petitioner "was motivated at least in part" by a unconstitutional consideration—instead of "in substantial part"—and therefore the court of appeals applied an erroneous standard of law (Brief at 14); (2) the district court's finding that an unconstitutional reason played "a substantial part" in the Board's decision is not supported by the evidence (Brief at 11). We deal with these challenges in turn.

First, we do not understand the court of appeals to have reversed, or even questioned, the factual finding of the district court that the WSAI phone conversation played "a substantial part" in the Board's decision. The court of appeals said in fact that "the record supports the finding of the district court." The failure of the court of appeals to use the word "substantial" in describing the finding of the district court is reflective not of the appellate court's differing view of the facts here but rather, in all likelihood, of its view of the applicable legal standard. Thus, even if the legal standard apparently adopted by the court of appeals were erroneous, petitioner would not be helped, for the factual finding made by the district court (which is both supported in the record, as we show below, and unchanged by the court of appeals) is sufficient to meet the legal standard which petitioner asserts is correct: if "the constitutionally impermissi-

ble reason played a substantial part in the nonrenewal" decision, the decision is defective (Brief at 14).

In any event, we believe petitioner is wrong as to the applicable legal standard and that the standard stated in the court of appeals' decision is correct. As discussed in part A, this Court has ruled that "even though the government may deny . . . [a] benefit for any number of reasons, there are *some reasons upon which the government may not rely.*" *Perry* v. *Sindermann, supra,* 408 U.S. at 597 (emphasis added). The nonrenewal of a public school teacher "may not be predicated upon his exercise of First and Fourteenth Amendment rights." (*Id.* at 598). The rationale for this rule is no less applicable where a nonrenewal is predicated in part upon such a constitutionally impermissible consideration. Whether a teacher's employment is terminated wholly or partially in retaliation for the exercise of First and Fourteenth Amendment rights, a penalty is exacted for that exercise, and future exercise of those rights by that teacher or others will be chilled. The federal courts of appeals have uniformly ruled that a "decision to terminate employment of a teacher which is only *partially* in retaliation for the exercise of a constitutional right is unlawful." *Gray* v. *Union County Intermediate Education District,* 520 F.2d 803, 806 (9th Cir. 1975). Accord: *Skehan* v. *Board of Trustees of Bloomsburg state Col.,* 501 F.2d 31, 39 (3rd Cir. 1974), remanded for further consideration on other grounds, 421 U.S. 983 (1975), rehearing *en banc* on other grounds, —— F.2d ——, No. 73-1613 (1976); *Langford* v. *City of Texarkana, Ark.,* 478 F.2d 262, 266, 268 (8th Cir. 1973); *Gieringer* v. *Center School District No. 58,* 477 F.2d 1164, 1166, n. 2 (8th Cir. 1973), *cert. denied,* 414 U.S. 832; *Simard* v. *Board of Education of Town of Groton,* 473 F.2d 988, 995 (2d Cir. 1973); *Cook County College Teachers Union* v. *Byrd,* 456 F.2d 882, 888 (7th Cir. 1972); *Fluker* v. *Alabama State Board of Education,* 441 F.2d 201, 210 (5th Cir. 1971).

Petitioner argues that under the rule adopted by these courts "a teacher might participate in unpopular conduct just to insure employment" (Brief at 15). But this argument misapprehends the meaning of the rule. The rule provides no protection to a teacher who is terminated for permissible reasons, regardless of whether coincidentally the teacher has engaged in protected activity. Nor is the rule invoked by the mere fact that governmental decisionmakers are aware of, and view with distaste, a public employee's involvement in protected activities, so long as that involvement does not play a part in their decision. The rule has effect only where the teacher, or other public employee, can show that the government *relied upon* the impermissible reason in reaching its decision.

Second, it is undisputed here that the WSAI phone conversation played a part in the Board's determination to deny petitioner a continuing contract. Petitioner seeks to relitigate in this Court the correctness of the district court's finding that the conversation played "a substantial part" in that determination. As we have just shown, whether the part played by the conversation was "substantial" or something less than that is not a matter of legal significance. Nevertheless, there is no difficulty in demonstrating that there is ample support in the record for the district court's finding.

The only explanation for the Board's action given contemporeously with that action, the only explanation given without the self-serving pressures of litigation, is that contained in the letter of explanation sent to Doyle by the Superintendent after consultation with the Board (App. 247-248, 289). That letter listed two incidents as the basis for the Board's decision. The first was: "You assumed the responsibility to notify WSAI Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people" (App. 289). This letter alone is sufficient basis for the court's find-

ing of fact. But petitioner would have this Court undertake to make its own evaluation of the proper weight to be given this evidence (Brief at 11):

> "The [Superintendent's] letter standing alone does not justify a conclusion that the Board based its decision substantially on the phone call because (1) the Superintendent, not the Board, wrote the letter and (2) in it expressly stated that the reason was Doyle's lack of tact."

Neither of these arguments undermines the district court's finding. While the Superintendent, the Board's agent, wrote the letter, he testified that before sending it he consulted with the Board as to "the terms that were going to be put in the communique" (App. 247-248). And, as we have already shown in Part A, "lack of tact" was not an independent factor on which the Board relied but was the conclusion the Board drew from the two incidents set forth in the letter, the first of which was the WSAI phone call. There is thus no basis for overturning the district court's finding of fact that the WSAI call played "a substantial part" in the Board's decision.

The conclusion of the courts below that the Board's decision to deny Doyle a continuing contract was in violation of the First Amendment should be upheld.

C. The Remedy Awarded By The Courts Below Properly Restores To Doyle What He Was Unconstitutionally Denied: A Continuing Contract To Teach.

The Board denied Doyle a continuing contract to teach on account of Doyle's exercise of First Amendment rights. The courts below had an obligation to fashion a remedy which truly "make[s] good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684, (1946). The wrong here is not made good if Doyle remains in a less advantageous position because of his exercise of First Amendment rights. Thus, at a

minimum a proper remedy must restore to Doyle what he was unconstitutionally denied: a continuing contract to teach. That is the remedy ordered by the district court and upheld by the court of appeals. It should be sustained here.

Consistent with the decisions below in this case, the federal courts of appeals uniformly have held that reinstatement is a necessary part of the remedy where a teacher, or other public employee, has been terminated from employment for the exercise of rights protected by the First Amendment.

> "While the equitable relief of reinstatement of state employees discharged in violation of their constitutional rights has been primarily used in teacher dismissals, the Courts have established the principle that reinstatement is a necessary element of an appropriate remedy in wrongful employee discharge cases . . ."

Abbott v. *Thetford*, 529 F.2d 695, 701 (5th Cir. 1976); see also, e.g., *Sterzing* v. *Fort Bend Independent School District*, 496 F.2d 92, 93 (5th Cir. 1974); *Janetta* v. *Cole*, 493 F.2d 1334, 1338 (4th Cir. 1974); *Gieringer* v. *Center School District No. 58*, 477 F.2d 1164, 1167 (8th Cir. 1973), *cert. denied*, 414 U.S. 832; *Cole* v. *Choctaw County Board of Education*, 471 F.2d 777, 779 (5th Cir. 1973); *Hanover Township Federation of Teachers* v. *Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972), affirming, 318 F. Supp. 757, 763 (N.D. Ind. 1970); *Ramsey* v. *Hopkins*, 477 F.2d 128 (5th Cir. 1971).[19] Where the rights violated derive from the First Amendment, it is particularly important that the remedy make the victim whole. A remedy

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[19] See also, *Skehan* v. *Board of Trustees of Bloomsburg State College, supra*, 501 F.2d at 45; *Stolberg* v. *Board of Trustees for State College of Connecticut*, 474 F.2d 485, 491 (2d Cir. 1973); *Donahue* v. *Staunton*, 471 F.2d. 475, 477, 480 (7th Cir. 1972); *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir. 1966) (*en banc*), *cert. denied*, 385 U.S. 1003; *Smith* v. *Hampton Training School for Nurses*, 360 F.2d 577, 581 (4th Cir. 1966) (*en banc*).

which leaves a teacher disadvantaged for the exercise of First Amendment rights would have a "chilling effect" on the willingness of that teacher and others to engage in such protected conduct; by the same token, a school board would be given the message that it may after all achieve the improper result it sought—the suppression of unwanted expression.[20]

Petitioner implicitly agrees that in the normal case reinstatement—here with a continuing contact—is the appropriate relief for a non-renewal which violates the First Amendment (Brief at 14-15). Petitioner argues, however, that in this case the normal rule should not apply because the Board's decision was based on permissible factors as well as impermissible ones (Brief at 14). We address that argument now.

As we have shown, the Board did in fact base its decision in part on an impermissible consideration in violation of Doyle's First Amendment rights. And, as we have shown, the proper remedy for this violation is to make Doyle whole —to place him in the position in which he would have been but for the Board's unconstitutional decision. That the Board's decision was based in part on permissible as well impermissible factors is pertinent only if it could be established that the Board would have made the same decision to deny Doyle a continuing contract even without the impermissible factor— even without the WSAI phone call. For then, and only then, is it fair to say that but for the Board's unconstitutional decision Doyle still would not have had a continuing contract. However, as we now show, it was the Board's burden to prove that this is such a case; and, that burden is a heavy one which was not met here.

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[20] *Cf., Smith* v. *Hampton Training School for Nurses, supra,* 360 F.2d, at 581; *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-418 (1975); *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965).

"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 265 (1946). In the words of Judge Learned Hand, speaking for the court in *NLRB* v. *Remington Rand, Inc.,* 94 F.2d 862, 872 (2nd Cir. 1938), "it rest[s] upon the [wrongdoer] to disentangle the consequences for which it is chargeable from those from which it was immune." See also, *Baxter* v. *Savannah Sugar Refining Corp.,* 495 F.2d 437, 445 (5th Cir. 1974), *cert. denied,* 419 U.S. 1033. Doyle's entitlement to reinstatement was presumptively established when he proved that a basis for the Board's decision was his exercise of First Amendment rights. If the Board wished to defeat that entitlement it had to show clearly and convincingly that the consequences flowing from its wrong would have occurred in any event.

A useful analogy is found in decisions dealing with the question who is entitled to a "make-whole" remedy where racial discrimination in employment has been proved. Where, for example, an employer is shown to have engaged in a pattern and practice of racial discrimination in hiring, the impermissible factor of race can be said to have played a part each time a black employee was denied a job.[20a] But, in some circumstances, an employer may be able to prove that notwithstanding its racial discrimination, the applicant would have been denied a job in any event for other legitimate reasons. This Court held in *Franks* v. *Bowman Transportation Co.,* —— U.S. ——, 44 LW 4356, 4363, and 4363, n. 32 (1976), that, in such circumstances, each black applicant is "presumptively entitled" to make-whole relief, and

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[20a] In the instant case the showing is stronger: here the finding of causation does not rest upon an inference from a pattern of conduct, but rather upon the employer's own admission that he relied upon the impermissible factor.

that the employer has the burden of defeating that entitlement with respect to any particular employee by proving that the employee would have been denied a job regardless of the race factor. As the Court in *Franks* put it, "No reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue." *Ibid.*

Indeed, good reason appears why the burden should be borne by the perpetrator of the wrong. In addition to the inherent fairness of requiring the proven wrongdoer to provide his own escape hatch, there is the practical consideration that the facts pertinent to the issue of what the employer would have done in the absence of the impermissible factor are peculiarly within the knowledge of the employer.

The federal courts of appeals have established that the employer can meet the burden described in *Franks* only by "clear and convincing" evidence. See, *e.g., Day* v. *Mathews,* 530 F.2d 1083, 1085 (D.C. Cir. 1976); *Baxter* v. *Savannah Sugar Refining Corp., supra,* 495 F.2d at 444-445; *Johnson* v. *Goodyear Tire and Rubber Co.,* 491 F.2d 1364, 1375, 1379-1380 (5th Cir. 1974). This standard is essential to assure that the victim of the wrong is not mistakenly denied relief.

The analysis of *Franks* and the court of appeals decisions just cited applies with equal force to the situation here where the exercise of First Amendment rights rather than race is the impermissible factor taken into account by this public employer. Suppose, for example, the Board had written a letter to a black teacher explaining that he had been denied a continuing contract because:

> "A. You are black. This raised much concern not only within this community, but also in neighboring communities.
>
> "B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present."

That teacher would have been entitled to the remedy awarded here unless the Board could show by clear and convincing evidence that it would have reached the same decision regardless of race. The same result should obtain here where the first reason given is Doyle's exercise of conduct protected by the First Amendment. Surely, rights derived from the First Amendment stand on equal footing with the statutory right to be free of racial discrimination in employment. Indeed, this Court has always required that whatever rules may apply in other contexts, "freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66 (1963).

By the standard thus applicable, petitioner has failed to meet its burden. At trial, none of petitioner's witnesses denied that the WSAI call played a part in the Board's decision; none of petitioner's witnesses testified that the Board would have reached the same result if it had not considered that call.[20b] Petitioner presented no showing which would defeat Doyle's presumptive entitlement to reinstatement with a continuing contract. That remedy was therefore properly awarded by the courts below.

III. THE ELEVENTH AMENDMENT DOES NOT BAR THE BACKPAY AWARD AGAINST THE SCHOOL BOARD

The Board did not assert an Eleventh Amendment defense in the district court. That court, construing O.R.C. §3313.17 as a statutory waiver of whatever Eleventh Amendment immunity school boards might otherwise en-

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[20b] We do not mean to suggest that such testimony, had it been offered without corroborative evidence, would have deserved uncritical acceptance by the district court.

joy,[21] regarded the Board's silence as a "concession" to that effect. App. 30. Awakened by the district court's decision, the Board made the Eleventh Amendment its principal claim on appeal.[22] Argument No. 1 in its appellate brief was titled:

> "The Eleventh Amendment of the United States Constitution grants sovereign immunity to political entities of the State, including the Mt. Healthy Board of Education. That immunity is not waived by section 3313.17 of the Ohio Revised Code."

Doyle countered with arguments (1) that the School Board is not the "State" for Eleventh Amendment purposes, and (2) that, if it is, its immunity was waived in §3313.17. The Court of Appeals affirmed without discussion of this issue.

We show herein that the Eleventh Amendment does not

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[21] §3313.17 provides, in pertinent part:
"The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property."

[22] The Board was not foreclosed from invoking the Eleventh Amendment for the first time on appeal. *Edelman* v. *Jordan*, 415 U.S. 651, 677-678 (1974); *Sosna* v. *Iowa*, 419 U.S. 393, 396 n.2 (1975). However, its failure to assert this "defense" (*Sosna, supra*) in the district court has meant that no evidence was introduced by either party which might illuminate its status for Eleventh Amendment purposes, e.g. evidence relating to the financial relationship between the Board and the State. In some circumstances, this evidentiary gap might disable appellate courts from adjudicating the Eleventh Amendment issue and necessitate a remand. See, e.g., *Soni* v. *Board of Trustees of University of Tennessee*, 513 F.2d 347, 352 (6th Cir. 1975), cert. denied, 44 LW 3702 (1976). In the instant case, however, we believe the Eleventh Amendment issue can be resolved without remand, for Ohio statutes and decisions demonstrate on their face that school boards are not the "arm or alter ego" of the State and thus do not share the State's Eleventh Amendment immunity.

bar the backpay award against the Board: the Board is not the "State" for Eleventh Amendment purposes. Because the Board so clearly does not enjoy Eleventh Amendment protection it is unnecessary for this Court to reach the question whether, as held below, §3313.17 constituted a waiver of such protection.[23]

The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign country."

Despite its literal wording, the Eleventh Amendment applies to suits by a citizen against his own state. *Hans* v.

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[23] Were it necessary to reach that question, the construction of §3313.17 by the district court, affirmed by a unanimous court of appeals panel including two Ohio judges, would be entitled to affirmance without "independent examination of the state law issue" by this Court. *Bishop* v. *Wood*, —— U.S. ——, 44 LW 4820, 4822 (1976). There is no state court decision squarely in point, but the Ohio Supreme Court decisions establish that a school board has been "stripped of its attributes of sovereignty", and is to be treated like "any other litigant", when sued with respect to the exercise of any of its powers enumerated in §3313.17 (which includes the powers to contract and be contracted with). *State ex rel. Board of Education* v. *Gibson*, 130 Ohio St. 318, 199 N.E. 185, 187 (1935):

> "Not being an entire sovereignty, there is no sound reason for treating it in a manner different from the manner of treating any other litigant. The law should be of universal application and without distinction among litigants. The fact that a board of education or school district is engaged in a public task is an immaterial circumstance. When it is rendered subject to suit without consent, it is automatically stripped of its attribute of sovereignty and of the exemptions and immunities available to sovereignties."

See also *Brown* v. *Board of Education*, 20 Ohio St. 2d 68, 253 N.E. 2d 767 (1969), explaining the distinction between this principle and that applicable to common law tort actions which do not "relate to" a school board's exercise of its §3313.17 powers.

Louisiana, 134 U.S. 1 (1890); *Edelman* v. *Jordan,* 415 U.S. 651, 662-663 (1974).

Theoretically, a state might so structure its affairs that all governmental functions were performed by the state government. In that event, the Eleventh Amendment would shield all such functions from monetary exposure in federal court actions. But that has not been the experience of our nation. In practice, every state has opted to transfer power over many governmental functions to legally separate entities—cities, towns, counties, school boards, etc.—whose officers are elected locally, and who have sources of revenue independent of the state treasury. This option for local control has had critical significance to the application of the Eleventh Amendment.

It is hornbook law that "a suit against a county, a municipality, or other lesser governmental unit is not regarded as a suit against a state within the meaning of the Eleventh Amendment." Hart and Wechsler, *The Federal Courts and the Federal System,* 690 (2d Ed.). As the Court explained in *Hopkins* v. *Clemson Agricultural College,* 221 U.S. 636, 645 (1911):

> "[N]either public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty."

Accord: *County of Lincoln* v. *Luning,* 133 U.S. 529 (1890); *Kennecott Copper Corp.* v. *State Tax Commission,* 327 U.S. 573, 579 (1946). See also, *Moor* v. *County of Alameda,* 411 U.S. 693, 717-721 (1973).

In *Edelman* v. *Jordan, supra,* 415 U.S. at 667, n. 12, this Court drew a sharp distinction between Illinois' Department of Public Aid (the agency involved in *Edelman*) and a county in Virginia which the Court had previously ruled was *not* entitled to the state's Eleventh Amendment immunity:

> "The Court of Appeals considered the Court's decision in *Griffin* v. *School Board,* 377 U.S. 218 (1964), to be of [relevance]. But as may be seen from *Griffin's* citation of *Lincoln County* v. *Luning,* 133 U.S. 529 (1890), a county does not occupy the same position as a State for purposes of the Eleventh Amendment. See also *Moor* v. *County of Alameda,* 411 U.S. 693 (1973). The fact that the county policies executed by the county officials in *Griffin* were subject to the commands of the Fourteenth Amendment, but the county was not able to invoke the protection of the Eleventh Amendment, is no more than a recognition of the long-established rule that while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment."

Of course, states create some agencies which are not autonomous, but are simply administrative vehicles through which the state exercises powers which it has *not* passed to local control. Agencies of this type are an integral part of the state government, and suits against such agencies are really suits against the state. Thus, in *State Highway Commission of Wyoming* v. *Utah Construction Co.,* 278 U.S. 194, 199 (1929), the Court found the Wyoming's Highway Commission was covered by the Eleventh Amendment because the Commission "was but the arm or alter ego of the state with no funds or ability to respond in damages." But local school boards are not of this character. To be sure, most states retain *some* measure of control over public education. The legislature can revise the governing statutes, and in most states, as in Ohio, a state board of education has been created to perform certain enumerated duties of statewide interest. See O.R.C. §3301.17.[24] But in most states,

[24] That *state* board, of course, might well constitute an "arm or alter ego of the state" and thus partake of the State's Eleventh Amendment immunity.

including Ohio as we will soon show, vast quantities of power have been turned over to locally elected school boards, in implementation of a policy judgment that the public schools should be locally controlled and managed. Among these are tax-levying and bond-issuing powers which enable school boards to generate independent revenues and assure that monetary judgments against school boards will not impact upon the state treasury.

Recognition of the autonomy of local school boards was critical to this Court's decision, in *Milliken* v. *Bradley,* 418 U.S. 717 (1974), that absent special circumstances multi-district relief cannot be awarded upon a finding of *de jure* discrimination within one school district. The Court rejected the district court's "analytical starting point"—that "school district lines are no more than arbitrary lines on a map drawn 'for political convenience' "—with this analysis, *Id* at 741-742:

> "[T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See *Wright* v. *Council of the City of Emporia,* 407 U.S., at 469. Thus, in *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 50 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.' "

Because school districts and school boards are in most

states autonomous political and corporate entities implementing a societal preference for local management and control of the public schools, it is hardly surprising that the overwhelming weight of judicial authority has found them not immunized by the Eleventh Amendment. *Hander* v. *San Jacinto Junior College,* 519 F.2d 273 (5th Cir. 1975) (Texas);[38] *Hutchison* v. *Lake Oswego School District,* 519 F.2d 961 (9th Cir. 1975) (Oregon); *Burt* v. *Board of Trustees of Edgefield School District,* 521 F.2d 1201 (4th Cir. 1975) (South Carolina); *Adams* v. *Rankin County Board of Ed.,* 524 F.2d 928 (5th Cir. 1975) (Mississippi); *Monnell* v. *Dept. of Social Services,* 532 F.2d 259 (2nd Cir. 1976) (New York City Board of Education); *Campbell* v. *Gadsden County Dist. School Bd.,* 534 F.2d 650, 655-656 (5th Cir. 1976) (Florida); *Morris* v. *Board of Education of Laurel Sch. Dist.,* 401 F. Supp. 188, 203-205 (D. Del. 1975) (Delaware); *Smith* v. *Concordia Parish School Board,* 387 F. Supp. 887 (W.D. La. 1975) (Louisiana). See also *Singer* v. *Mahoning County Board of Mental Retardation,* 519 F.2d 748 (6th Cir. 1975) (Ohio); Note, *Damage Remedies for Constitutional Violations,* 89 Harv. L. Rev. 922, 931-932 (1976). Contrast, *Harris* v. *Tooele County School District,* 471 F.2d 218 (10th Cir. 1973) (Utah) (judgment might be paid from state treasury).

Of course, this analysis would be inapplicable if Ohio, unlike most states, had *not* vested management and control in locally elected school boards established as separate political and corporate entities, or if Ohio had not provided school boards independent revenue powers and thus left

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[38] Although the defendant in *Hander* was a junior college district, the Court explained that "junior college districts in Texas enjoy the same legal and constitutional status as 'independent school districts,' " 519 F.2d at 279, n.13. See also *Wright* v. *Houston Independent School District,* 393 F. Supp. 1149 (S.D. Tex. 1975), holding that Texas school districts do not enjoy the state's Eleventh Amendment immunity.

judgments to be paid from the state treasury. But as both the Ohio decisions and the Ohio statutes make clear, Ohio has opted for a structure virtually identical to that in Michigan described in *Milliken, supra,* 418 U.S. at 742, n. 20.

> "The Legislature has entrusted, by statute, the entire management and supervision of the schools to boards of education and has given them virtually unlimited powers with regard to school matters and policy. [Citing *Stinson* v. *Board of Education,* 17 Ohio App. 437; 48 Ohio Jurisprudence 2d, pp. 780-781]."

State ex rel. Fleetwood v. *Board of Education,* 20 Ohio App. 2d 154, 252 N.E. 2d 318, 321 (1969).[36]

> "Boards of education have been invested by the General Assembly with extensive powers within their sphere of activity . . .
>
> "Under our statutes, a board of education is elected by vote of the people. As already indicated, it is charged with the management and control of the public schools and is authorized to employ and fix the salaries of those operating the schools. Moreover, it may 'make such rules and regulations as it deems necessary for its government and the government of its employees.'
>
> "It will thus be seen that the General Assembly has granted boards of education wide latitude and discretion in the particulars mentioned . . ."

Greco v. *Roper,* 145 Ohio St. 243, 61 N.E. 2d 307, 309-310 (1945), followed in *State* v. *Judges of Court of Common Pleas,* 173 Ohio St. 239, 181 N.E. 2d 261, 265 (1962), and *Holroyd* v. *Eibling,* 188 N.E. 2d 797, 801 (Ct. App. 1962).

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[36] Accord: *Long* v. *Bd. of Education, Ontario Local Sch. Dist.,* 45 Ohio Misc. 5, 340 N.E. 2d 439, 441 (Ct. Com. Pl. 1975); *Rumora* v. *Bd. of Edn. of Ashtabula Area City Sch. D.,* 43 Ohio Misc. 48, 335 N.E. 2d 378, 383-384 (Ct. Com. Pl. 1973).

See also *Dayton Classroom Teachers Association* v. *Dayton Board of Education,* 41 Ohio St. 2d 127, 131, 323 N.E. 2d 714, 717[37] (1975).

The Ohio Constitution, Art. VI, Sec. 3, mandates that the citizenry of every city "shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power . . ." The members of the school board are "elected at large by the qualified electors of such district." O.R.C. §3313.02.

"The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued," O.R.C. §3313.17, and in it is vested the "management and control of all of the public schools of whatever name or character in its . . . district", §3313.47. To carry out this mandate, local school boards are armed with broad powers. "The board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises," §3313.20. It is invested with the capacities of "contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property." §3313.17.

The key to the local school board's autonomy, of course,

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[37] And see, *McClung* v. *Bd. of Ed. of City of Washington C.H.,* 46 Ohio St. 2d 149, 346 N.E. 2d 691, 695 (1976); *Justus* v. *Brown,* 42 Ohio St. 2d 53, 325 N.E. 2d 884, 887 (1975); *Long* v. *Board of Education,* 36 Ohio St. 2d 62, 64, 303 N.E. 2d 890, 892 (1973); *Wardwell* v. *Bd. of Ed. of City School Dist.,* 529 F.2d 625, 629 (6th Cir. 1976).

is its fiscal independence from the state. While each school board receives state aid pursuant to pre-fixed per-capita formulae, Chapter 3317, O.R.C., each board has the power to levy and collect taxes, unilaterally up to certain limits and by concurrence of the local electorate beyond those limits, §§5705.03, 5705.192, 5705.194, and to issue bonds, Chapter 133, O.R.C.[28]

In the face of this clear statutory design establishing local school boards as autonomous political and corporate entities, the Board offers two arguments to support its contention that it is the "State" for Eleventh Amendment purposes:

1. The Board asserts that school boards are "not authorized to raise taxes or sell property to pay a tort claim", and that the judgment below therefore could not be met "without further action by the state legislature" (Brief, p. 30). The Board is wrong. Even if a claim of constitutional violation were regarded as a "tort claim," no "further action by the state legislature" would be required to pay the judgment in this case. For the Ohio legislature has unquestionably empowered the Board to issue bonds if necessary for the payment of a judgment against it "in an action for personal injuries or based on any other non-contractual obligation." O.R.C. §133.27.[29] If the Board could not otherwise pay the judgment, yet failed to issue bonds in accordance with its power under §133.27, it could be compelled by mandamus to issue the bonds.[30] We doubt, however, that it would be necessary for the Board to resort to its bond issuing power to comply with the judgment herein. Ohio by statute provides for backpay awards against school boards, O.R.C. §3319.16, state courts in Ohio regularly issue backpay awards against school boards for violation of state law,[31] and the Board's tax levying authority is so broadly based—to meet "current operating expenses" (§5705.03), "indebtedness" (ibid.), "the necessary requirements of the school district" (5705.192), "current expenses of the school district" (ibid.), and "the emergency requirements of the school district" (§5705.194)—that it cannot credibly be contended that the Board is precluded from paying the judgment for backpay herein from its general tax revenues. While it is thus clear that the Board has power to pay the judgment, we do not understand how the Eleventh Amendment issue could be affected even if it were not. Plaintiff

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[28] In most school districts in Ohio, the majority of the revenues are derived from local taxes and not from the state. *Baldwins Ohio School Law,* Section T 123.02, page 148. Because petitioner did not assert an Eleventh Amendment defense in the district court, see n. 22 *supra,* evidence on this point as to this particular school district was not introduced below.

[29] § 133.27 is part of Ohio's Uniform Bond Law. We quote it below. As will be seen, its provisions apply to "any subdivision." The Bond Law expressly states that city school boards are "subdivisions" governed by its provisions, § 133.01(a). The text of § 133.27 is as follows:

"When the fiscal officer of any subdivision certifies to the bond issuing authority that, within the limits of its funds available for the purpose, the subdivision is unable to pay a final judgment or judgments rendered against the subdivision in an action for personal injuries or based on any other non-contractual obligation, then such subdivision may issue bonds for the purpose of providing funds with which to pay such final judgment in an amount not exceeding the amount of the judgment or judgments together with the costs of the suit in which such judgment or judgments are rendered, and interest thereon to the approximate date when the proceeds of such bonds are available."

[30] *State ex rel. Turner* v. *Bremen,* 116 Ohio St. 294, 156 N.E. 134 (1927); *State ex rel. Turner* v. *Bremen,* 117 Ohio St. 186, 158 N.E. 6 (1927).

[31] *Sorin* v. *Board of Education,* 39 Ohio Misc. 108 (Com Pl. 1974), reversed on another issue (this issue not appealed), 46 Ohio St. 2d 177 (1976); *State ex rel. Edmundson* v. *Board of Education of Northwestern Local Sch. Dist.,* 2 Ohio Misc. 137 (Com Pl. 1964); *Zartman v. Board of Education,* 33 Ohio Misc. 217 (Com Pl. 1972); *Board of Education* v. *Manoloff,* 5 Ohio Misc. 113 (Com Pl. 1963).

might be discomfited if he were unable to collect, but that would not make the school board the "State" nor would it subject the State to any potential liability. The judgment herein cannot possibly impact upon the state treasury, for here, as in *Hutchison, supra,* 519 F.2d at 966-967 (9th Cir. 1975):

> "A set amount of state aid is awarded each year on the basis of the number of students an amount which would not be altered by the back pay award in the present case."[81a]

2. The Board's second argument is that Ohio has chosen to immunize school boards from common law tort claims, and that that decision precludes the federal courts from issuing judgments against school boards. (Brief, pp. 29-30). This argument would turn the Supremacy Clause upside down.

The issue in this case is not what immunity is available under state law with respect to violations of state law, but what immunity is available under federal law with respect to violations of the federal Constitution. The resolution of that issue necessarily is one of federal law. Any rule of immunity to be applied "must be a 'federal' one because the federally created cause of action cannot be restricted by state laws or rules relating to sovereign immunity . . ." *Smith* v. *Losee,* 485 F.2d 334, 341 (10th Cir. 1973) (*en*

[81a] Moreover, even if the law of Ohio were that a default by a school board entitled the judgment creditor to look to the state treasury, that would not warrant withholding a monetary award altogether. The Eleventh Amendment would be fully vindicated, in the event of a school board's default, by the federal court refusing to enforce the judgment against the state treasury. Only if an award against a school board would "inevitably" be paid from the state treasury would the Eleventh Amendment justify withholding the award altogether. *Cf. Edelman, supra,* 415 U.S. at 665. On this point we believe Judge Holloway's dissenting opinion to be correct, and the majority opinion of the Tenth Circuit wrong, in *Harris, supra,* 471 F.2d 218.

banc), cert. denied 417 U.S. 908 (1974). Accord: *Jones* v. *Marshall,* 528 F.2d 132, 137 (2nd Cir. 1975); *Dewell* v. *Lawson,* 489 F.2d 877, 882 (10th Cir. 1074). And see *Imbler* v. *Pachman,* — U.S. —, 44 LW 4250, 4255 (1976); *id* at 4258 (dissenting opinion of Mr. Justice White). The Eleventh Amendment provides a federal immunity, and the applicability of that immunity depends upon the powers, characteristics and relationships conferred upon a body by state law, not the labels affixed by the state. It is not within the state's power to bestow Eleventh Amendment immunity upon autonomous political and corporate entities which, because "locally controlled [and] essentially local in character", *Campbell, supra,* 534 F.2d at 676 (5th Cir. 1976), are outside the Amendment's sweep. "[I]t must be remembered that governmental immunity invoked by a state and its agencies is not identical to Eleventh Amendment immunity found in the United States Constitution." *Wright* v. *Houston Independent School District,* 393 F. Supp. 1149, 1153 (S.D. Tex. 1975). It is by no means as clear as petitioner suggests that Ohio would regard the "governmental immunity" which its courts have historically extended to local governments in tort actions—but in no other actions—as applicable in this case.[82] But be that as it may, Ohio's disposition of im-

[82] In *State ex rel. Board of Education* v. *Gibson,* 130 Ohio St. 318, 199 N.E. 185, 186-187 (1938), the court declared unequivocally that school boards in Ohio do *not* share the State's sovereign immunity. The issue in that case, in which a school board brought a contract action as plaintiff, was whether the defendant could invoke the statute of limitations against it. The court reasoned:

> "That a state is immune from the operation of the statute of limitations is universally recognized. The ancient maxim nullum tempus occurrit regi (no time runs against the crown) still prevails. This immunity is an attribute of sovereignty and can only be waived by express provision to that effect within the statute.
>
> "Does such immunity attaching to the state accrue to the benefit of a board of education or school district?
>
> *"This immunity is extended to the state as an attribute of sov-*

munities in state law actions—a matter which it is free to decide any way it wishes, on policy bases similar to or wholly divergent from those underlying the Eleventh Amendment —cannot control the construction of that Amendment.

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ereignty and does not extend to a board of education or school district. Excepting only the sovereign, the law recognizes no distinction in litigants, and the same rule of law is applicable to all.

"A state, as an attribute to its sovereignty, cannot be sued without its consent. When a board of education or school district is clothed with the capacity to sue and be sued, it is thereby rendered amenable to the laws governing litigants, including the plea of the statute of limitations. To give one character of litigants special privileges over other litigants is to create artificial distinctions which have no place in a progressive democracy.

" 'The principle, that the sovereign power of a state is not bound by statutes of limitation, without express words, obtained in the earliest stages of the common law, and has descended to this day. This rule is sometimes of odious application; but it is adopted as incidental to sovereignty, and necessary to preserve against negligence or cupidity, those rights which the state has acquired or retained.

" 'This immunity, however, seems to be an attribute of sovereignty only. No case is found in the books which exempts any other description of person, whether natural or artificial, from the operations of the laws; and none of the reasons for the exemption, apply with much force to municipal corporations. The law imposes upon them the duty of defending the interests which they are created to hold, and has conferred every power necessary to this end.' Lessee of City of Cincinnati v. First Presbyterian Church, 8 Ohio, 298, 299, at page 310, 32 Am.Dec. 718.

" 'Exemption from the operation of the statute is a privilege of soverignty, and this privilege can only be asserted by, or on behalf of the sovereign.' 25 Ohio Jurisprudence, 630.

"A board of education or school district does not partake of the elements of sovereignty and is not entitled to immunity from the statute of limitations.

"The extension of the privileges of sovereignty to others than the general and state governments does not find favor in enlightened jurisdictions. 17 Ruling Case Law, 972, 973.

"Where a statute does not expressly except a subordinate political subdivision from its operation, the exemption therefrom does not exist.

"Where a board of education or school district is subject to suit, it is to be treated, for the purpose of such suit, in the same manner as a private litigant. Not being an entire sovereignty, there is no sound reason for treating it in a manner different from the manner of treating any other litigant. The law should be of universal application and without distinction among litigants. The fact that a board of education or school district is engaged in a public task is an immaterial circumstance. When it is rendered subject to suit without consent, it is automatically stripped of its attribute of sovereignty and of the exemptions and immunities available to sovereignties." (Emphasis added).

Moreover, the Ohio legislature has recently taken action which demonstrates that whatever tort immunity school boards enjoy *is* for reasons divergent from those underlying the Eleventh Amendment and *not* because they partake of the State's sovereignty. In 1975, the Ohio General Assembly abolished the tort immunity of "the State," but not that of "political subdivisions." §§2743.01, 2743.02. The line drawn was precisely that which the Eleventh Amendment draws: the "State" was defined as including state departments and agencies, but excluding "municipal corporations,

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Despite this analysis, the Ohio courts have continued to hold school boards immune from damage liability in *tort* cases. The Ohio Supreme Court explained the dichotomy in *Brown* v. *Board of Education,* 20 Ohio St. 2d 68, 253 N.E. 2d 767 (1969). School boards were "stripped of their sovereignity," as *Gibson* held, when they were rendered suable in § 3313.17. But that section, properly construed, renders them suable only in actions which "relate to" their exercise of the other powers conferred upon them in that section. One of the powers conferred in § 3313.17 is to contract and be contracted with. The instant suit "relates to" the Board's exercise of its contracting power. The Ohio courts have not spoken as to which side of the *Brown* line the instant case would fall on, but it is surely arguable that it falls on the *Gibson* side. This Court need not, of course, resolve this question of Ohio law, for as we have shown above federal principles, and not Ohio law, govern the proper construction of the Eleventh Amendment. We have undertaken this exploration of Ohio law only to show that even on petitioner's own mistaken premise—that Ohio law controls—its assertion of immunity would be doubtful.

townships, villages, counties, *school districts,* [etc.]."[33] This legislative distinction surely did not reflect a judgment that school boards partake more of the State's sovereignty than the State itself. Rather, it reflects the deference which the Ohio General Assembly pays to the autonomy of local school boards: the decision as to their own status was left to them.

As the Board is not the "State," and as the backpay award herein cannot possibly impact upon the state treasury, the Eleventh Amendment does not preclude the award.

CONCLUSION

For the reasons set forth in this brief, the decision below should be affirmed.

Respectfully submitted,

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[33] 2743.01 Definitions
As used in Chapter 2743 of the Revised Code:

(A) "State" means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include polical subdivisions.

(B) "Political subdivisions" means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.